Native Title Newsletter

July/August, No. 4/2009

WHAT'S NEW

■ AIATSIS National Indigenous Studies Conference
perspectives on urban life:
CONNECTIONS AND RECONNECTIONS
29 SEPTEMBER ■ 1 OCTOBER 2009
Manning Clark Centre
Australian National University, Canberra
WWW.AIATSIS.GOV.AU

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Traditional Owner Comment

By Donovan Jenkins-Japalparri, Tjurabalan Native Title Land Corporation

The Tjurabalan people achieved recognition of their native title rights over approximately 26,000 sq km of land and waters in the Tanami Desert region in 2001. It was the first successful claim of the Kimberley Land Council and only the third consent determination in Western Australia.

Donovan Jenkins-Japalparri is the grandson of Ivy Robertson, a Nyangayi Napangarti senior claimant and member of the KLC Executive. He worked for four years as a Project Officer for the Tjurabalan Native Title Corporation. He is a professional musician and producer who also works as an interpreter and cross-cultural facilitator.

The impact of native title

In the beginning, native title meant 'getting their land back' to the old people. People had the idea that once they got native title, something 'higher than freehold', they would have control over their land.

The rights that we were given were rights that we already had – rights to hunt, fish, gather – we had those rights all along and more than that. The rights that we got through native title were only a small amount of the rights that we traditionally had.

Native title is a weak weapon – much weaker than the power we have over land by Traditional Law.

The day after we 'got our land back' my grandmother turned to me and asked "What has changed? What is different? Looks to me like everything is the same." In the end, the land was always there, the land was never physically taken. What was taken was the control of the land through the imposition of law.

My grandmother said that if we had understood what we were fighting for in the native title process, perhaps we wouldn't have fought for it. I know that she meant she would have fought for something bigger and better. Native title is a weak weapon – much weaker than the power we have over land by Traditional Law.

Source: National Native Title Tribunal

Tjurabalan Native Title Corporation RNTBC

The biggest issue for our prescribed body corporate (PBC) apart from money is money, money, money. Over time, as people have seen limited benefits from land ownership, they have become disillusioned. We haven't got the resources to rent an office, hold meetings or be organised to start activities. We never have enough money to build up our assets, pay staff or get annual funding.

At the moment, we are hoping to build up our pastoral stations and trying to use the Indigenous Protected Area to generate a viable tourist income without it getting out of control. People are hoping that the Tanami Gold NL mine will produce benefits, that the old people who fought for us in court will see some personal benefits. Uranium exploration is also a big issue.

The next steps for Tjurabalan RNTBC

There is a cold war between cultures. Aboriginal people have always been and are still learning from Western culture, but Western culture is not properly learning from Aboriginal culture. Aboriginal people were forced till today to adapt to work both ways, white way and traditional way.

In many ways, Western culture is like a steam train hurtling down the tracks with no brakes. Aboriginal culture has much wisdom to teach Western culture. Aboriginal people have a strong family culture, we live in harmony with the earth and with people. I think that

Western cultures can learn from these ways. But learning takes humbleness and an equalization of power and control.

We want the PBC to be an interface between the Western world and the Aboriginal world. The PBC should be run by the old people as decision makers who are accountable to the people according to traditional values. We want young people working there too, educated in the Western way to make sure the PBC has the capacity to be an interface and a 'gateway'. Anyone who enters our land should have to go through the PBC - a permit system. We want to control what non-Aboriginal influences come in and profit from them. This was our original concept.

I believe we need to restructure the PBC according to traditional law, selecting our representatives from Dreaming groups. This is partly why we have had governance issues as we have always had Western people with their structures, ideas and world views imposed on us instead of our long-proven, universally understood structures

I want to say something positive about native title. Our people are happy to receive acknowledgement and recognition of our ownership. However, if you apologise to someone but don't change your behaviour, then it's just lip service. And if you give someone native title but don't give them rights or power, then it's just lip service again.

Source: National Native Title Tribunal

Solid work you mob are doing: New Report on Indigenous decision making and conflict management

Members of the project working group and speakers at the launch of the report.

L-R: (Back) Warwick Soden, Robin Thorne, Prof Mick Dodson (Chairperson AIATSIS), Prof Murray Kellam AO (Chairperson NADRAC, Chief Justice Black (Federal Court), Hon Robert McClelland (Federal Attorney-General), David Allen

L-R; (Front) Helen Bishop, Juanita Pope, Rhian Williams, Louise Anderson, Gaye Sculthorpe and Toni Bauman.

On Friday 4 September the Federal Court of Australia hosted the launch of a new report on Indigenous dispute resolution and conflict management in Australia which was prepared in collaboration with AIATSIS.

The report '"Solid work you mob are doing": Case studies in Indigenous Dispute Resolution and Conflict Management in Australia', was presented to the National Alternative Dispute Resolution Advisory Council as part of the Federal Court of Australia's Indigenous Dispute Resolution & Conflict Management Case Study Project.

The report, edited by Juanita Pope and Toni Bauman, contains three principal case studies and several smaller 'snapshot' studies. It draws upon these studies to make recommendations for effective dispute resolution practices.

The Hon Professor Murray Kellam AO, Chairperson of NADRAC, the Hon Robert McClelland MP, Commonwealth Attorney-General, Professor Mick Dodson, Chairperson of AIATSIS and Chief Justice Black

spoke about the report, its findings and its recommendations.

The report is available to download here: http://www.fedcourt.gov.au/aboutct/aboutct_pubscorp.html

Reflections on Women and Native Title

By Cynthia Ganesharajah, Research Officer and Pip McCourt, Aurora Intern

The role of women in native title processes is an area which has received limited attention in native title literature. In some circles, there exists a predominant view that women have been excluded from native title in Australia, that they are marginalised, inadequately represented and play minimal roles in negotiations.[1] A key question is whether this view is based on the lacunae in native title literature rather than an examination of past and present native title processes.

As Ciaran O'Faircheallaigh highlighted in his presentation to the Native Title Conference 2009, many women have played a prominent role in native title and mining agreement negotiations both in Australia and internationally.[2] In particular, O'Faircheallaigh discussed the strong and influential participation of women in the Argyle Diamond Mine negotiations in the Kimberley region of Western Australia.[3] In considering the role of women, he pointed out that it is important to look beyond the people who are sitting at the negotiating table. Just because women are not the public face of native title negotiations does not mean that they have had no input into or influence over the native title claim.

Women may often be involved in setting the agenda for negotiations and the ongoing implementation of native title agreements.

It is important to acknowledge that the potential exists for women to be under-represented in native title processes. This potential stems, in part, from the misunderstanding among some non-Indigenous persons that men hold primary responsibility for land in Aboriginal societies. Early anthropological research into Aboriginal society in Australia was primarily conducted by male anthropologists working with Aboriginal men and tended to view women as the primary bearers of cultural and spiritual knowledge.[4] However, the work of a number of influential anthropologists and researchers has allowed a greater understanding of the key roles that Aboriginal women hold in these areas, even when it is not immediately visible to outsiders.[5]

Because of these assumptions, non-Indigenous people involved in native title may fail to recognise how Indigenous women can and should be involved. This has had implications for the methods and mechanisms through which women present evidence in litigated claims in both the native title and land rights frameworks. Some have argued for a more flexible approach to evidence laws so that Aboriginal women have the opportunity to speak and show evidence on *their* terms.[6]

According to O'Faircheallaigh, another interrelated, but slightly different, factor is the nature of the processes surrounding native title. A process which is inclusive, 'open', and mobilises the entire community will provide opportunities for women to get involved. It will also have a significantly positive impact on the benefits generated by a native title agreement.[7]

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[1] See for example G Gibson and D Kemp, 'Corporate engagement with indigenous women in the minerals industry' in C O'Faircheallaigh and S Ali (eds) *Earth Matters: Indigenous peoples, the extractive industries and corporate social responsibility*, Sheffield, UK, 2008.

[2] C O'Faircheallaigh, 'Indigenous Women and Mining Agreement Negotiations in Australia and Canada', presentation to the National Native Title Conference 2009, Melbourne, 5 June 2009.

[3] Ibid.

[4] C Wohlan, *Aboriginal Women's Interests in Customary Law Recognition*, Background Paper 13, Law Reform Commission of Western Australia, Perth, 2005, p.515

[5] See for example D Bird-Rose, 'Women and Land Claims', *Land, Rights Laws: Issues of Native Title*, no. 6, January 1995; M Langton, 'Grandmother's Law, Company Business and Succession in Changing Aboriginal Land Tenure Systems,' in G Yunupingu (ed) *Our Land is Our Life: Land Rights Past, Present and Future*, University of Queensland Press, St Lucia, Queensland, 1997, pp.86-87; and D Bell, *Daughters of the Dreaming*, McPhee Gribble, Melbourne, 1983.

[6] Bird Rose, ibid p.7.

[7] O'Faircheallaigh, above n2.

What is AIATSIS doing?

Since 2007 an Indigenous Women's Talking Circle has become a permanent part of the annual Native Title Conference. The Circle gives Indigenous women the opportunity to meet together to discuss their perspectives and roles in the native title process and in the sustenance of culture and nurturing indigenous identities. Discussions have centered on indigenous representation, leadership, economic development and mining agreement negotiations.

Participants from the Talking Circles have called for an increase in Aboriginal women's leadership roles. This would create greater equity in the native title process. Key themes from the Talking Circles include:

- Women's leadership comes from their confidence in knowing country and culture.
- Women feel their role is undervalued and want a greater say in what happens in their country.
- Women want to encourage younger women to be involved with native title processes.
- Women leaders need support, respect and recognition from their families as well as from the community.

Specific recommendations have also been made to AIATSIS about how it can increase women's involvement in native title. These include:

- AIATSIS to hold a national interim Native Title Conference dealing specifically with Aboriginal and Torres Strait Islander women on issues within the Native Title Framework.
- AIATSIS to establish a special fund to increase participation of Indigenous women at all future Native Title Conferences.
- AIATSIS to consider the importance of discussing the role of Aboriginal and Torres Strait Islander women in Prescribed Bodies Corporate as part of the Native Title Conference.

Conclusion

There is a clear need for much more research into Indigenous women's participation in native title. It is important that this research does not over generalise and recognises that each woman may have a difference experience. It is also important to investigate Indigenous women's own perceptions about their involvement in native title. Would they characterise themselves as being excluded?

More broadly, further research is required on the participation levels of a range of interest groups involved in native title. For example, do native title negotiations involving discussions about health and wellbeing initiatives include or consult health workers? Another example is the involvement of youth. A key concern in native title is capacity building for future generations and succession planning, but does the native title process allow for the inclusion of youth representatives?

Aboriginal and Torres Strait Islander women are undoubtedly an integral part of their communities and it important to ensure that they are given the opportunity to participate in all areas of native title.

Section 223: Thoughts of an Intern

By Madeleine Rowley, Aurora Intern

Section s223 of the *Native Title Act 1993* (Cth) has been twisted into a barbed wire fence that most native title applicants can not surmount. Judicial interpretation of the section has led to the development of an increasingly onerous and complex test that all litigated native title claims must pass to be successful.[8] Section 223 provides a definition of native title, stating that native title rights and interests are those rights and interests that are 'possessed under the traditional laws acknowledged, and the traditional customs observed' by the Indigenous claimants.[9] The courts have held that this requires claimants to prove that the laws and customs currently acknowledged and observed have been continually practised, without substantial interruption, since sovereignty.[10] This places an impossibly heavy evidentiary burden on native title claimants.[11]

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[8] Kent McNeill *Emerging Justice: Essays on Land Rights in Canada and Australia*(2000), 80; see also Simon Young 'The Trouble with Tradition' (2001) 30 *Western Australia Law Review,* 48.
[9] *Native Title Act 1993* (Cth), s223(a).
[10] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [45]-[47], [50], [58]-[61], [79].
[11] Richard Bartlett 'An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: Yorta Yorta' *Western Australian Law Review* 45 (2003),

Furthermore, the court is unwilling to make allowances for the devastating impact of European colonisation on Indigenous societies. The majority clearly stated in *Bodney v Bennell*[12] that if there has been a substantial interruption in the practice of traditional laws and customs, the reason for the interruption is irrelevant to the decision of whether or not native title rights and interests exist.[13] Consequently, those who have lost the most as a result of colonisation, are the biggest losers under the current statutory regime.[14]

As the current Chief Justice French has stated, our native title legislation is in need of reform.[15] He recognises the overly onerous evidentiary challenge faced by claimants and suggests the implementation of presumptions to lessen the burden of proof.[16] Indeed the Canadian approach may provide guidance for a more just statutory test for native title. In Canada for example, Lamer J in *Van Der Peet* held that it is not necessary to show an 'unbroken chain' of observance of traditional laws and customs.[17] It's presumed that if an indigenous society exists and has its roots in pre-sovereignty society, its laws and customs are traditional.[18]

Even from my humble position as an intern in Canberra, it is clear that reform is overdue. A strict requirement of continuity, as demanded by the Full Court's position in *Bodney v Bennell*,[19] risks perpetuating the historical injustice inflicted upon Indigenous people.[20]

45; see also H. Patrick Glenn 'Continuity and Discontinuity of Aboriginal Entitlement' (2007) 7(1) *Oxford University Commonwealth Law Journal,* 26, 29,31; see also Kirby J and Guadron J's minority judgement in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

[12] *Bodney v Bennell* [2008] FCAFC 63, [74], [97]. See also *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46], [47], [50]. [87]. The test of change is quite stringent, see *Bodney v Bennell* [2008] FCAFC 63, [80] where the Full Court rejects Wilcox J finding that the expansion of Boodjas is an acceptable change.

[13] Ibid.

[14] McNeill, above n 1; Young, above n 1.

[15] Chief Justice Robert French,'Lifting the burden of native title: Some modest proposals for improvement.' (2009) *Reform,* 93.

[16] Ibid.

[17] Glenn, above n 4, 17.

[18]*Calder v Attorney – General (British Colombia)* (1973) 34 DLR (3d 145, as cited in Richard Bartlett 'An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: Yorta Yorta' *Western Australian Law Review* 45 (2003), 18, 41-42; see also Glenn, above n 4.

[19] [2008] FCAFC 63.

[20]McNeill, above n 1; see also Young, above n 1.

Negotiating Native Title Settlements

By Anna McGlennon, Aurora Intern

During my internship in the Native Title Research Unit I have come to realise that there are numerous compelling reasons why native title settlements should be resolved through negotiation rather than litigation.

Litigation can place substantial stress on individuals and on entire communities. The adversarial system tends to polarise opponents' during the trial, and this can adversely affect relationships long after the litigation has ended. Additionally, there is no guarantee that the outcome of litigation will be satisfactory. Native title cases are commonly appealed to higher courts adding further costs. Even when a native title determination is reached by litigation, parties still need to negotiate about the practicalities of exercising coexisting rights and interests.

Reaching an agreement through negotiation may provide a solution to some of these issues. Of course, certain issues may be common to both litigation and negotiation. For example, both can be complex and lengthy, often requiring legal and other staff to be employed for long periods of time and requiring large numbers of people to be housed, fed and moved across often remote areas.

In addition to these general problems of settling native title issues, certain difficulties are unique to negotiation. It is critical that negotiators are aware of these problems and are equipped with the skills necessary to manage them. Several elements of the negotiation process must be addressed in order to minimise obstacles:

- Understanding each party's underlying needs, goals, hopes, motivations and concerns;
- Building constructive and sustainable relationships;
- Addressing communication issues to allow parties to articulate their interests and negotiate with each other;
- Brainstorming a number of different options;
- Clear and manageable commitments and agreements; and
- Parties must be equipped with adequate resources and skills, experience and training.

Critically, all negotiating parties must feel confident in the negotiation process and be committed to achieving successful native title outcomes.

If these elements of negotiation are adequately addressed, negotiation can potentially provide the greatest opportunity for sustainable social, cultural and economic benefits for Indigenous stakeholders.

Book Launch - Murray River Country

NTRU would like to congratulate Research Fellow, Dr Jessica K. Weir on the recent publication of her PhD thesis *Murray River Country: An Ecological dialogue with traditional owners*.

The publication was launched by John Doyle and Yorta Yorta woman Monica Morgan at the Melbourne Writers' Festival on Saturday 29 August.

Murray River Country discusses the water crisis from a unique perspective – the intimate stories of love and loss from the perspectives of Aboriginal people who know the inland rivers as their traditional country.

These experiences bring a fresh narrative to contemporary water debates about living in the Murray-Darling Basin, and how we should look to more sustainable ways to live in Australia as our approach to water is changing in the face of water scarcity, drought, climate change, and water mismanagement. This book brings new insights to these issues by focusing our attention on what Indigenous people from along the Murray are experiencing, saying, and doing.

This information was taken from the Aboriginal studies Press website. More information about the book, and purchasing, is available here: http://www.aiatsis.gov.au/asp/aspbooks/murrayriver.html

NTRU Project Reports

NTRU Publications

Toni Bauman and Cynthia Ganesharajah, 'Second National Meeting of Registered Native Title Bodies Corporate, Melbourne 2 June 2009', *Native Title Research Report*, 2/2009.

This report outlines the discussions, recommendations and commitments of the representatives who attended the second national meeting of registered native title bodies corporate (RNTBC). A key outcome of the meeting was the resolution to establish a national body to represent RNTBCs.

Dr Kingsley Palmer, 'Societies, Communities and Native Title', *Land, Rights, Laws: Issues of Native Title*, vol.4, no.1, 2009.

This paper examines the use and meaning of the terms 'community' and 'society' in native title cases. The author considers this use from an anthropological point of view but situates it within legal contexts relevant to native title law. Further, the author explores whether there is a difficulty for anthropologists in the way these terms may be used in the context of native title processes and if this be the case, how such difficulty may be alleviated or circumvented.

Simon Young, 'Native Title in Canada and Australia post-Tsilhqot'in: Shared Thinking or Ships in the Night?', *Land, Rights, Laws: Issues of Native Title*, vol.4, no.2, 2009.

The Canadian decision of Tsilhqot'in Nation v British Columbia (BC Supreme Court, 2007) was a significant step in the resolution of a long-running timber dispute in western Canada, and the most important judicial exploration of Canadian 'Aboriginal title' since the watershed 2002 decision of Delgamuukw. This paper examines the Tsilhqot'in decision against the backdrop of the Canadian legal history, and attempts to explain its significance from both the Canadian and Australian perspectives.

NTRU Project Page Updates

The NTRU has updated the Project Webpages for the following Major Projects:

- Connection
- Joint Management – information relating to joint management arrangements and native title in the ACT, NSW, SA and WA have been uploaded.

What's New

Legislative Reforms and Reviews

Australian Government, Discussion Paper on Expediting Indigenous Housing in Remote Communities, Attorney-General's Department, Department of Families, Housing, Community Services and Indigenous Affairs, Australian Government, Canberra, 2009.

This discussion paper focuses on reform of public housing and infrastructure in remote Indigenous communities and proposes a new specific process to facilitate these developments. The Government is considering amending the *Native Title Act 1993* (Cth) to include a specific future act process to ensure that public housing and infrastructure in remote Indigenous communities can be built expeditiously following consultation with native title parties but without the need for an Indigenous Land Use Agreement (ILUA).

For further information see: http://www.fahcsia.gov.au/sa/indigenous/pubs/land/Pages/NativeTitleAmendments_DiscussionPaper.aspx

Australian Government, Overcoming Indigenous Disadvantage: Key Indicators 2009 Productivity Commission, Australian Government, Canberra, 2009.

Overcoming Indigenous Disadvantage 2009 (OID) is the fourth report in a series commissioned by heads of Australian governments in 2002, to provide regular reporting against key indicators of Indigenous disadvantage. The long term objective of the report is to inform Australian governments about whether policy programs and interventions are achieving positive outcomes for Indigenous people. This will help guide where further work is needed.

In March this year, the terms of reference were updated in a letter from the Prime Minister. The new terms of reference align the OID framework with COAG's six high level targets for Closing the Gap in Indigenous outcomes. The OID aims to help governments address the disadvantage that limits the opportunities and choices of many Indigenous people. However, it is important to recognise that most Indigenous people live constructive and rewarding lives, contributing to their families and wider communities. That said, across nearly all the indicators in the OID, there are wide gaps in outcomes between Indigenous and non-Indigenous Australians.

Australian Government, Reform of Indigenous heritage protection laws : Improving protection for Indigenous traditional areas and objects, Department of Environment, Water, Heritage and the Arts, Australian Government, Canberra, 2009.

This discussion paper canvasses possible reforms to the legislative arrangements for protecting traditional areas and objects, specifically the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). The aims of the reform are twofold. First, to ensure that Indigenous Australians will have the best opportunities to protect their heritage. This could be done by using existing processes such as native title to secure agreements on heritage protection. Second, to cut duplication and red tape by establishing a nationally consistent approach to protecting Indigenous heritage based on best practice standards.

The deadline for submissions is Friday 6 November 2009. Additional information relevant to the proposals in this paper is available at www.heritage.gov.au/indigenous/lawreform

Western Australian Government, Review of Approvals Processes in Western Australia, Industry Working Group, Western Australian Government, Perth, 2009.

This report suggests a two phased approach to improving approval processes in Western Australia. Phase one recommendations are essentially administrative and can be addressed without legislative change. Phase two recommendations require legislative change. The report stresses that the need to address and change the present flawed and complex approvals system is critical, and the time for implementing phase one recommendations is now.

Chapter 3 discusses native title and provides a case study example. The report notes that the effective and efficient administration of the processes contemplated by the *Native Title Act 1993* (Cth) is critical for the development of projects in remote and regional Western Australia. Most of the (reported) major native title agreements benefit a relatively small number of Aboriginal people and a few groups have received (and continue to receive) very large financial payments as a result of the development of multiple large projects within their claim areas. The report acknowledges the critical role played by the State.

Recent Cases

Ampetyane v Northern Territory of Australia [2009] FCA 834

The Ilkewartn and Ywel Anmatyerr peoples were granted, under section 87 *Native Title Act 1993* (Cth), an order for a consent determination determining native title rights and interests in their land and waters. In making the consent determination the central consideration was whether there was a free and informed agreement between the parties.

The determination covers an area of approximately 117 600 hectares of land located along the Stuart Highway approximately 15 kilometres south of Ti Tree and 130 kilometres north west of Alice Springs, comprising the eastern half of the Pine Hill Pastoral Lease. Where native title was found to exist, the native title holders were granted the right to: access and travel; live on the land; hunt, gather and fish; take and use natural resources; access, take and use natural water; light fires for domestic purposes; access and maintain sites and places important under traditional law and customs; right to conduct cultural activities; make decisions about the use of the land by other Aboriginal people governed by the native title holders laws; share or exchange natural resources; and be accompanied on the area by persons required to perform cultural activities, persons with rights acknowledged and assist, observe or record traditional activities.

Banks v State of Western Australia [2009] FCA 703

The Jiddngarri application, relating to part of the Kimberley region of Western Australia, had twice previously failed the registration test. In those instances, the Registrar’s Delegate had decided that the claim did not satisfy all the merit conditions of the registration test in section 190B of the *Native Title Act 1993* (Cth) (NTA). In this case, the Court was satisfied that the application had not been amended since the Registrar's decision, and was not likely to be amended in a way that would lead to a different conclusion being reached. Consequently, the application was dismissed by the Court pursuant to its discretionary power under section 190F(6) NTA.

BHP Billiton Minerals Pty Ltd, Itochu Minerals & Energy Of Australia Pty Ltd and Mitsui-Itochu Iron Ore Pty Ltd v Martu Idja Banyjima (Mib) Native Title Claimants (Wardens Court)

The Martu Idja Banyjima Native Title Claimants objected to the grant of a miscellaneous licence to three mining companies in the Wardens Court. The objections were that the purposes were not directly connection with mining operations, it was inconsistent with the *Iron Ore (Mount Newman) Agreement Act 1964*, and that it was not in the public interest. The Warden dismissed the objection and granted the licence.

Champion v State of Western Australia [2009] FCA 941

In this case the respondents sought under section 190F(6) *Native Title Act 1993* (Cth) for the court, on its own motion, to dismiss an application that had not been amended since it failed the registration test. The court held there was no reason why the application should not be dismissed.

Davis-Hurst on behalf of the Kattang People v Minister for Lands [2009] FCA 725

In this case the judge dismissed two notices of motion in which the respondent sought to keep a court application active contrary to orders made by a previous judge. The previous orders granted leave to discontinue the proceedings in relation to two parcels of land as a result of a Memorandum of Understanding between the Director-General of the Department of Environment and Climate Change (NSW) and the Saltwater Tribal Council (Aboriginal Corporation).

Dodd on behalf of the Wulli Wulli People v State of Queensland [2009] FCA 793

In this case a motion to give effect to a resolution adopted at a native title claim group meeting was adjourned. The reason was that there were claims that the resolution was affected by the inclusion of votes by people who were not members of the claim group. Justice Dowsett held that

the application be adjourned to allow further investigations.

FMG Pilbara Pty Ltd/ Wintawari Guruma Aborginal Corporation; Ned Cheedy and Others on behalf of the Yindjibarndi People/ Western Australia [2009] NNTTA 63

FMG Pilbara Pty Ltd, as the potential grantee of a mining lease, made an application pursuant to section 35 of the *Native Title Act 1993* (Cth) for a future act determination under section 38 of the Act. This application was made on the basis that the negotiating parties had not been able to reach agreement within six months of the State of Western Australia giving notice of its intention to do the future acts. The future acts were the grant of two mining leases under the *Mining Act 1978* (WA) on land that was overlapped by land held by the Wintawari Guruma Aboriginal Corporation. It was decided that FMG Pilbara Pty Ltd and the State of Western Australia had negotiated in good faith with the relevant native title parties, and consequently the Tribunal did have the power to conduct an inquiry and make the future act determination as requested by FMG Pilbara Pty Ltd.

FMG Pilbara Pty Ltd/ Ned Cheedy and Others on behalf of the Yindjibarndi People/ Western Australia, [2009] NNTTA 91

On 23 April 2008 the Western Australian Government gave notice under section 29 of a future act – a proposed mining lease in the registered claim of the Yindjibarndi people. After a six month period the proposed lessee (FMG Pilbara Pty Ltd) applied for a future act determination under section 38. Although the Yindjibarndi people challenged the National Native Title Tribunal's power to make the decision by arguing FMG and the Government had not negotiated in good faith, this claim was rejected on 24 April 2009.

In this case the Tribunal considered the substantive question of whether the lease should be granted. Overall it was held that the Tribunal should make the determination on the condition that the four extra conditions proposed by the Government were imposed. This would significantly mitigate the impact the grant of the proposed lease. If no conditions were imposed the lease would have a significant impact on the capacity of the native title holders to access and use the area, including conduct ceremonies and protect sites. It would also have a significant impact on Yindjibarndi morale.

Jinibara People v State of Queensland [2009] FCA 816

In this case notices of motion that sought to join parties to a native title claim were dismissed. The court held that the requirements for joinder under section 84(5) *Native Title Act 1993* (Cth) had not been met.

Kuuku Ya'u People v State of Queensland [2009] FCA 679

This case involved a consent determination recognising that native title rights and interests exist over the land and waters in the Determination Area in Far North East Queensland. The Kuuku Ya'u people hold exclusive rights to possession, occupation, use and enjoyment of a specified area of land within the Determination Area, which does not include water. As to the remainder of the Determination Area, the Kuuku Ya'u people hold non-exclusive native title rights and interests. These non-exclusive rights and interests include the right to hunt and gather, use the natural resources in specified areas, camp on the land, and maintain and protect significant and important sites and places under traditional laws and customs. The nature and extent of the non-exclusive native title rights and interests varied across the determination area. It was agreed that there were no native title rights and interests in relation to minerals and petroleum.

Sambo v State of Western Australia [2009] FCA 940

In this case the respondents sought under section 190F(6) *Native Title Act 1993* (Cth) for the court, on its own motion, to dismiss an application that had not been amended since it failed the registration test. It was held that because there was a reasonable and imminent possibility of the application being amended in a way that could give rise to its registration the application would not at the current stage be dismissed.

Wik and Wik Way Native Title Claim Group v State of Queensland [2009] FCA 789

The Wik and Wik Way Peoples were granted an order for a consent determination determining native title rights and interests in their land and waters. The background to the determination was the Western Cape Communities Co-Existence Agreement, an indigenous land use agreement (ILUA), signed between the traditional owners and a range of other parties. Under the Co-Existence Agreement traditional owners were required to

commence native title determination applications over land in the ILUA. There were two native title determinations preceding the current case.

In this case the land and waters were broadly described as the land and waters on the western side of Cape York Peninsula landward of the high water mark at mean spring tide of the sea of the Gulf of Carpentaria, bounded to the north by the Embley River and to the south by the Edward River and extending in the east to the upper reaches of the watercourses that drain into the Gulf of Carpentaria.

The Wik and Wik Way Peoples were granted non-exclusive rights to: live on the determination area; access, move about and use the area; use natural resources for personal, domestic or non-commercial communal needs; maintain and protect significant sites and places; conduct social, religious, cultural, spiritual and ceremonial activities; and hunt and gather on the area for personal, domestic or non-commercial communal needs.

Wilson v Northern Territory of Australia [2009] FCA 800

This case involved a consent determination recognising the native title rights and interests of fifteen Mudburra or Jingili or mixed Mudburra/Jingili estate groups over almost 144 hectares of land in Elliott. The determination area is to the south east of the determination area in *King v Northern Territory of Australia* [2007] FCA 944 (Newcastle Waters matter). Exclusive possession was recognised over parts of the determination area. In relation to the non-exclusive areas a range of rights and interests were recognised including, amongst others; the right to access, hunt and fish, gather and use natural resources, conduct cultural activities and ceremonies and protect significant sites and places.

Native Title Publications

Articles / Books

Hayley Bennett and GA Broe, 'The neurobiology of judicial decision-making: Indigenous Australians, native title and the Australian High Court', Public Law Review, vol.20, no.2, 2009, pp.112-128.

Adam MacLean, 'Frameworks to settling native title', Indigenous Law Bulletin, vol.7, no.12, 2009, pp.27-30.

Juanita Pope and Toni Bauman (eds), ' "Solid work you mob are doing" : Case studies in Indigenous Dispute Resolution and Conflict Management in Australia', Report to the National Alternative Dispute Resolution Advisory Council by the Federal Court of Australia's Indigenous Dispute Resolution & Conflict Management Case Study Project, 2009.

Patrick Sullivan, 'Policy change and the Indigenous Land Corporation', AIATSIS Research Discussion Paper 25, 2009.

Siiri Aileen Wilson, 'Entitled as against none: how the wrongly decided *Croker Island* case perpetuates Aboriginal dispossession', Pacific Rim Law and Policy Journal, vol.18, no.1, 2009, pp.249-280.

Simon Young, 'Cultural timelessness and colonial tethers: Australian native title in historical and comparative perspective', Australian Indigenous Law Review, vol.12, no.1, 2008, pp.60-68.

Speeches

Justice J.A. Dowsett, 'Beyond Mabo: understanding native title litigation through the decisions of the Federal Court', paper delivered to LexisNexis Native Title Law Summit, 15 July 2009.

Chief Justice French, 'Native Title – A Constitutional Shift?' JD Lecture Series, University of Melbourne Law School, 24 March 2009.

Graeme Neate, 'Negotiating comprehensive settlement of native title claims', paper delivered to LexisNexis Native Title Law Summit, 15 July 2009.

Other

National Native Title Tribunal, Guide to Sources of Assistance and Funding for Prescribed Bodies Corporate, July 2009.

National Native Title Tribunal, Guide to Australian Government Funding Sources, July 2009.

Native Title in the News

National

14-Aug-09 AU Native title changes The Federal Government is claiming that the *Native Title Act* is delaying the dispensing of housing and other building programs in remote Indigenous communities and is looking to change this process. Indigenous Affairs Minster Jenny Macklin said Aboriginal communities should benefit from the $5.5 billion in Government spending on social housing and infrastructure, as quickly as possible. *Illawarra Mercury* (Wollongong NSW, 14 August 2009), 5. *National Indigenous Times*, (Malua Bay NSW, 20 August 2009), 4. *Warrnambool Standard,* (Warrnambool VIC, 29 August 2009), 10.

New South Wales

20-Jul-09 NSW Native title claim on water reservoir Cabone Council has received advice from the Department of Lands that an Aboriginal land claim has been submitted for a two lot site located near Gidley Street Reservoir. The claim is understood to have been made back in October 2006 and is now being assessed by the Department. *Daily Liberal*, (Dubbo NSW, 10 July 2009), 7. *Central Western Daily,* (Orange NSW, 18 July 2009), 4.

30-Jul-09 NSW Native title after 16-year battle The Wik clan in Cape York have finally been granted access to their traditional lands, after a 16-year legal battle and a 30-year political battle. Federal Court Judge Justice Andrew Greenwood formally recognised the claim by the Wik and the Wik Way people to 1200 square kilometres of land covered by Rio Tinto's bauxite mining lease. *Maitland Mercury,* (Maitland NSW, 30 July 2009), 6. *Australian,* (30 July 2009), 3. *Cairns Bulletin,* (Cairns QLD, July 2009), 2. *Summaries - Australian Financial Review,* (29 July 209), 14. *Border Mail,* (Albury-Woodonga VIC, 29 July 2009), 6. *Warrnambool Standard,* (Warrnambool VIC, 29 July 2009), 7.

05-Aug-09 NSW Native title claim takes next step Wiradjuri families, the traditional owners of the Wellington region, have taken further steps to lodging a native title claim following a successful authorisation meeting. The claim covers a vast area of central west land including Wellington, Mudgee and Orange. Around 45 descendents of the traditional families attended the meeting at the Senior Citizens Centre to discuss the claim, which covers hundreds of square kilometres, and to introduce the professionals representing the group. The claim has been described as one of the strongest native title claims in the country. *Wellington Times,* (Wellington NSW, 5 August 2009), 3. *Central Western Daily,* (Orange NSW, 4 August 2009), 7. *Daily Liberal,* (Dubbo NSW, 3 August 2009), 6. *Wellington Times*, (Wellington NSW, 21 August 2009), 3 *Mudgee Guardian,* (Mudgee NSW, 17 July 2009), 6. *Wellington Times,* (Wellington NSW, 17 July 2009), 3.

13-Aug-09 NSW Native title claim settled after 15 years In 1994 three sisters - Lorna Kelly, Yvonne Graham and Linda Vidler - lodged a native title claim over a wide area of coastal Crown land that stretched from Byron Bay to Broken Head. Almost 15 years later the claim has almost been finalised. *Byron Shire News,* (Byron Bay NSW, 13 August 2009), 5. *Byron Shire News,* (Byron Bay NSW, 13 August 2009), 5.

Northern Territory

01-Aug-09 NT Land in Elliott handed over Traditional owners are celebrating after being given native title to a stretch of land in Elliott, 700 kilometres south of Darwin. Kim Hill, Northern Land Council Chief Executive has said it was the first time a native title determination had been granted by consent in the region. *Northern Territory News,* (Darwin NT, 1 August 2009), 3.

11-Aug-09 NT Native title given at Pine Hill Station The Northern Territory's Ilkewartn Ywel Anmatyerr People have been granted native title rights at Pine Hill Station. The Federal Court made a consent determination over almost 1200 square kilometres of land at the station 150 kilometres North of Alice Springs. The determination gives the people non-exclusive rights. *Northern Territory News, (*Darwin NT, 11 August 2009), 7. *Northern Territory News,* (Darwin NT, 8 August 2009), 12. *Tennant & District Times*, (Tennant NT, 14 August 2009), 3.

Queensland

01-Jul-09 QLD Kuuku Ya'u people granted first native title agreement over Queensland seas Queensland's Kuuku Ya'u people have become the first Indigenous peoples to have their traditional rights recognised through a native title agreement. At a Federal Court hearing at Portland Roads, Justice Andrew Greenwood recognised the Kuuku Ya'u people's exclusive rights. *Western Cape Bulletin,* (Weipa QLD, 1 July 2009), 5. *Cooktown Local News*, (Cooktown QLD, 1 July 2009), 8.

National Indigenous Times, (Malua Bay NSW, 9 July 2009), 8.

03-Jul-09 QLD Native title talks begin Talks aimed at reaching an agreement on native title have begun between the Pitta Pitta and Kalkadoon people and Councils in Western Queensland. The claim submitted covers an area of 30,090 square kilometres. *Longreach Leader*, (Longreach QLD, 3 July 2009), 7.

10-Jul-09 QLD State leads native title Natural Resource, Mines and Energy Minister Stephen Robertson has said that Queensland is leading Australia in dealing with native title issues. As part of NAIDOC week, Mr Robertson announced that Queensland has registered more than 200 voluntary Indigenous Land Use Agreements, over half the current national number. *Gladstone Observer, (*Gladstone QLD, 10 July 2009*), 8*.

24-Jul-09 QLD Land use agreements Tablelands Regional Council will enter into Indigenous Land Use Agreements with two groups that have native title claims over land within the region. The Council resolved to enter into agreements with the Mamu and combined Delabed Malanbarra Yidinji peoples to decide how the land would be used in the future. *Tablelands Advertiser*, *(*Mareeba QLD, 24 July 2009*), 10.*

06-Aug-09 QLD 16 year battle for Wik over The Wik community, after a 16 year legal battle and 30 year political struggle have finally been granted access to their traditional lands. The native title rights of the Wik and the Wik way people were formally recognised by Federal Court Justice Andrew Greenwood. The land is covered by a bauxite mining lease. *National Indigenous Times,* (Malua Bay NSW, 6 August 2009), 11.

29-Aug-09 QLD Dugongs poached Indigenous communities claim they are powerless to stop the illegal trade in dugong meat and turtle meat, after the Federal Government cut funding to its ranger program. Poachers at Yarrabah in far north Queensland have reportedly been abusing native title laws to kill dugong and turtles and selling the meat for up to $50 a kilogram. *Weekend Gold Coast Bulletin,* (QLD, 29 August 2009), 18. *Daily Mercury,* (Mackay QLD, 29 August 2009), 3.

South Australia

05-Aug-09 AU South Australian uranium mine gets green light Australia's uranium industry has received a boost with the recent approval of south Australia's Four Mile uranium mine. The mine will start its operations in early 2010 after receiving the 'go ahead' from Federal Environment Minister Perter Garrett in July. Members of the Adnyamathanha Aboriginal community in South Australia's Flinders Ranges have said that during negotiations their concerns were not adequately considered. Adnyamathantha Traditional Land Association Chairperson, Vince Coulthard said that the Association had very little choice and that Aboriginal people were disempowered, despite the Native Title Act. *Australian Mining Review,* (August 2009), 4. *National Indigenous Times,* (Malua Bay NSW, 23 July 2009), 7. *Roxby Downs Sun,* (Port Augusta SA, 23 July 2009), 4.

Victoria

07/2009 VIC New framework for native title settlement The Victorian branch of the Minerals Council has welcomed the new native title settlement framework. Executive Director Chris Fraser said the Framework was a welcome step forward in resolving native title in Victoria and would facilitate agreement making between the minerals industry and traditional land owners. *Australian Mining Review,* (July 2009), 4.

27-Jul-09 VIC No reward for miner Reward Minerals has been dealt a blow, with the Federal Government refusing to overrule a decision blocking its Lake Disappointment Potash mine. In May, the National Native Title Tribunal ruled the planned Potash mine could not proceed. Shares in Reward Minerals plummeted more than 20 per cent on the release of the news. *Border Mail,* (Albury-Wodonga VIC, 29 July 2009), 19. *Advertiser,* (Adelaide SA, 29 July 2009), 55. *North West Star,* (Mount Isa QLD, 29 July 2009), 17.

29-Aug-09 VIC Native title rebuke Victorian Attorney General Rob Hulls says the Federal Government is undermining Victoria's efforts to establish a new framework for resolving native title claims by refusing to fund it. Territory ministers are angry that the Commonwealth had tried to avoid the cost-sharing agreement which was reached last year. *Weekend Australian*, (29 August 2009), 2.

Western Australia

01-Jul-09 WA Land access deed signed with Innawonga Bunjima and Iron Ore Holdings A native title agreement has been reached between WA company Iron Ore and Innawonga and Bunjima people covering the central Pilbara. The claim includes parts of the

Karijini National Park and covers about 19,567 square kilometres. *Pilbara News,* (Pilbara WA, 1 July 2009), 8. *Australian,* (25 June 2009), 18. *Yamaji News,* (Geraldton WA, July 2009), 15.

03-Jul-09 WA Relief for native title claimants Nyungar Aboriginal Corporation Alternate Director has expressed relief after the town's native title claim, which mainly affects unallocated crown land around Esperance, successfully retained its registered claim status for the second time. *Kalgoorlie Miner,* (Kalgoorlie WA, 3 July 2009), 5.

03-Aug-09 WA Human Rights Commission may step in on BHP claim The Australian Human Rights Commission may intervene in legal action against mining giant BHP Billiton launched by an Aboriginal group opposing a mining claim in their traditional lands. BHP Billiton wants a mining lease over 200 square kilometres of Aboriginal land in the heart of the Pilbara, 1000 kilometres north of Perth. *Age,* (Melbourne VIC, 3 August 2009), 4.

06-Aug-09 WA Reward slumps on native title loss The Federal Court has dealt a blow to Reward Minerals by refusing to overrule a decision blocking its Lake Disappointment potash mine. In May the National Native Title Tribunal determined the planned potash mine in WA could not proceed. The area was leased covered and was deemed an extremely significant site for the Indigenous Martu people. *Businesses News,* (Perth WA, 6 August 2009), 24.

06-Aug-09 WA Agreement a boost for native title holders A landmark agreement has been established between the Broome Port Authority and Woodside to use selected land to establish a supply base which will support the Browse Basin LNG development. The development is being touted as a training and business opportunity for native title holders. *Broome Advertiser,* (Broome WA, 6 August 2009), 6.

07-Aug-09 WA Native title and uranium mining Native title claimants attended a series of workshops to learn about uranium mining and radiation in Geraldton. The workshops were also held in Canarvon and Karratha. They were hosted by Mid West native title body Yamatji Marlpa Aboriginal Corporation (YMAC). *Geraldton Guardian,* (Geraldton WA, 7 August 2009), 13.

14-Aug-09 WA Changes to mining approvals recommended Mid West miners have welcomed key recommendations which will improve the State's approvals process for mining and other major projects. The recommendations were released by the State appointed industry working group. The 15 recommendations include establishing a natural resource agency, changing the Environmental Protection Authority to a "stand-alone" entity, and altering native title processes and the environmental approvals process. *Geraldton Guardian,* (Geraldton WA, 14 August 2009), 7.

ILUAs

NAME	TRIBUNAL FILE NO.	TYPE	STATE OR TERRITORY	REGISTRATION DATE	SUBJECT-MATTER
Wuthathi People and Cook Shire Council ILUA	QI2007/020	Area agreement	QLD	26/06/2009	Access Consultation Protocol Infrastructure

This information has been extracted from the Native Title Research Unit ILUA summary: http://ntru.aiatsis.gov.au/research/ilua_summary.html , 1 September 2009. For further information about native title determinations contact the National Native Title Tribunal on 1800 640 501 or visit www.nntt.gov.au.

Determinations

SHORT NAME	CASE NAME	DATE	STATE OR TERRITORY	OUTCOME	LEGAL PROCESS	TYPE
Pine Hill Station	*Ampetyane v Northern Territory of Australia [2009] FCA 834*	07/08/2009	NT	Native Title Exists In Parts Of The Determination Area	Consent Determination	Claimant
Town of Elliott	*Wilson v Northern Territory of Australia [2009] FCA 800*	31/07/2009	NT	Native Title Exists In Parts Of The Determination Area	Consent Determination	Claimant

This information has been extracted from the Native Title Research Unit Determinations summary: http://ntru.aiatsis.gov.au/research/determinations_summary.html , 1 September 2009. For further information about native title determinations contact the National Native Title Tribunal on 1800 640 501 or visit www.nntt.gov.au.

Items in the AIATSIS Catalogue

The following list contains either new or recently amended catalogue records relevant to Native Title issues. Please check MURA, the AIATSIS on-line catalogue, for more information on each entry. You will notice some items on MURA do not have a full citation because they are preliminary catalogue records.

The AIATSIS Library now has copies of the Melbourne historical journal, issues beginning in 1961. Also, the Library holds duplicates of items from the Lambert McBride papers, the originals of which are in the State Library of Queensland. These include material from the Department of Aboriginal Affairs and the Queensland Council for the Advancement of Aborigines and Torres Strait Islanders from 1963-1997.

Audiovisual material of interest to native title includes:

Photographic:

• 373 colour slides of the the Dorothy Hackett Collection: Activities at Warburton Mission and on Ngaanyatjarra Lands 1964-1987. (HACKETT. D1.CS.)

Video:

Two videos produced by the University of Wollongong in 1987:

- *Aboriginal Elders of the South Coast*, produced by David Blackall, Part one. (PVM00127_1)
- *Aunty Eily Pitman Aboriginal Oral History Narration*. (PVM00126_1)

The films made by LaMont West in Queensland from 1964 to 1965 have been listed.

Rio Tinto Services, Limited, deposited a copy of their video, *ILUA Negotiations : a better way forward.*, produced in 2000 by JH Productions.

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THE NATIVE TITLE RESEARCH UNIT

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